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Monitoring Legal Aid in Indonesia

The Rights of Suspect/Defendant to Access Legal Counsel

Final report in Monitoring Legal Aid in Indonesia conducted in cooperation between Indonesian Institute for Independent Judiciary, Arab Council for Judicial and Legal Studies, and American Bar Association.

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Chapter 1

Introduction

A. Project Context

Equality before the law is an unalienable human right, which should not be violated due to reasons such as social structure and economic status. Everyone is entitled to obtain just and impartial justice.¹ A just legal process cannot be created without protection of the rights of defendants. Thus, there is a need of legal assistance to protect the rights of defendants to obtain a just process. Legal assistance or legal aid is part of the constitutional rights of citizens to obtain access to justice, and is also a factual legal issue experienced by citizens who are unable to face the structural power of the state. In Indonesian criminal procedural law, it is stated that the law enforcement is obliged to provide legal counsel, especially for defendants threatened with a sentence of 5 years or more, and those threatened with the death sentence.² In the Law on Advocates, it is also stated that advocates are obliged to provide legal aid free of charge to justice seekers who are unable to pay for legal counsel.³ However, in practice the condition is far from what the laws prescribe.

The guarantee of the rights of defendants and suspects in the criminal court is seen to be very weak. Results of LeIP's observation show that many defendants do not have legal counsel during court process. The lack of access for defendants to obtain legal counsel obviously disadvantages them, as they become very prone to misuses of power by investigators, prosecutors and judges, and they also lack opportunities to defend their rights in all stages of the judicial process. Certainly it is impossible for defendants, especially those being detained, to formulate adequate defences, such as writing demurrers, finding defence witnesses and other actions that benefit them in their defence.

The weakness of case administration in the courts is the reason why LeIP cannot depend

¹ Indonesia (1), *Law on The Ratification of The International Covenant on Civil and Political Rights*, Law No. 12 of 2005, Arts. 9-15.

² Indonesia (2), *Law on Criminal Procedure*, Law No. 8 of 1981, Art. 56.

³ Indonesia (3), *Law on Advocates*, Law No. 18 of 2003, Art. 22

on data of legal counsel that should have been available in the courts.⁴ During the ten-year period in which LeIP is active in court reform, it has discovered how court administration is not done properly. The condition results in court data becoming invalid to describe the performance of the legal counsel policy.

Thus, it is important to perform an activity that can describe how many cases are processed without legal counsel, especially cases that are obliged by law to have legal counsel. This activity is also expected to show that there is a serious problem in the criminal procedural law, especially in relation to the protection of the rights of defendants and suspects. This activity is in the form of monitoring of legal counsel activities in court, whose results will show the number of defendants and suspects who have advocates as counsel.

At present the Indonesian parliament is discussing the Legal Counsel Bill (*RUU Bantuan Hukum*). The bill was proposed by the parliament for enactment this year. This bill is intended to formulate a comprehensive model of legal counsel for disadvantaged citizens, in the form of litigation and non-litigation, to be performed by legal aid workers. The bill is now being discussed with the government, and is prioritised to be passed into law in 2011.⁵ The results of this activity are intended to become advocacy material to reform legal aid policy through the Legal Counsel Bill.

B. Method

LeIP performed the monitoring of legal counsel activities in several courts, detaining centres and police detaining centres in Jakarta, the largest city of Indonesia. The reasons of the selection of Jakarta as the observation and survey location are because the program is designed as a pilot project to monitor legal counsel activities in other locations, budget constraints and large number of cases.⁶ As the national capital, Jakarta has adequate infrastructure and access to courts.

⁴ During an interview with the Head of the West Jakarta State Court in 10 January 2011, LeIP requested to obtain data or statistics of legal counsel given by the court. However, the court was unable to provide the data. This shows that data on legal counsel is not managed properly. It is often that court data records differ from the actual occurrence. In an interview with a judge in the State Court, many defendants have submitted documents and are recorded to have received legal counsel, although in fact they never did, due to lack of available advocates.

⁵ Parliament of the Republic of Indonesia, *National Legislation Program*, (Jakarta: 2001)

⁶ Directorate General of General Judiciary, *2009 Criminal Case Statistics*, (Jakarta: 2010). In 2009, the Central Jakarta State Court handled 2537 cases, the West Jakarta State Court handled 3028 cases, and the South Jakarta State Court handled 2007 cases. The three courts handle the largest number of cases in Jakarta.

This activity is intended to provide an illustration of the workings of legal counsel, especially the availability of advocates for defendants and suspects that are supposed to be counselled. The project is split into two major activities, namely observation and survey. The observation was accomplished in September-October 2010, with an extension period of court monitoring in December 2010. The activities were done in stages, starting with observation in the courts, followed by surveys in detaining centres and police detaining centres. It was earlier planned to hold a survey in correctional facilities, but due to lack of permits, the survey activity was transformed into an extended observation period in the courts in December 2010.

B.1. Observation

The observations were held in the State Courts of Central Jakarta, South Jakarta and West Jakarta. The observations were done between 20 September and 14 October 2010, with an extension on 5-16 December 2010. The intention is to gain accurate data on the implementation of legal counsel.

The observations were done by observers who directly monitor each court session. The observation utilised instrument forms to find out how the court guarantees the right of the defendant for legal counsel. The observations were done in 18 days of court sessions, involving 15 observers, most of which are final year law students or fresh graduates. The sessions are usually held between 1-5 p.m., and each session can last between 4-5 hours.⁷ Each court has 5 courtrooms, each of which has an observer to monitor the sessions during the observation period. The information to be obtained includes the threatened sentence, existence of legal counsel, and whether the court offers legal counsel.

The result of observation will be shown in statistical data and the percentage level of assistance by legal counsel at the hearing in court. Not all observed cases are analysed. Before analysis, the data is verified to prevent multiple entries of a single case. This is done by looking at similarities of the (a) name of the defendant, (b) crime committed by the defendant, (c) Criminal Code article used in the indictment. Cases that appear in multiple are not analysed. As a result, the number of cases observed in this report is not the same as the number of total actual

⁷ “Three killed in Blowfish trial blowup.” <<http://www.thejakartapost.com/news/2010/09/30/three-killed-blowfish-trial-blowup.html>> Accessed on 30 January 2011. During the observation period, there was a riot in the South Jakarta State Court, resulting in cancellation of that day’s monitoring. All observers were asked not to perform the monitoring until the condition becomes conducive for research.

cases found in the observation. Results of the observation data are in the form of statistics and percentage of legal counsel presence in court sessions. The observation data also result in more specific data, such as the number of defendants detained without advocates, the dominant crime in a court region, etc.

B.2. Survey

The survey was performed at the Cipinang and Salemba detaining centres and the West Jakarta police detaining centre. It was originally planned to perform the survey at the South Jakarta correctional institution and police detaining centre, but due to lack of permit, LeIP cannot complete the survey activities in those locations. This results in the number of respondents, which is lower than expected. Furthermore, the permit was given at short notice before the activities, resulting in inadequate preparations.⁸ From the expected 180 respondents, LeIP can only contact 115 respondents. However, to compensate, LeIP prolonged the observation in the courts to enrich existing data.

The survey was done by using questionnaires to suspects in the detaining centres. The questions are not much different from the indicators used in the court observation. In general, the information to be provided by the respondents includes the threatened sentence, availability of advocates, access to family members or advocates, and whether the police provide legal counsel. The results of the survey are in the form of statistics and percentage of suspects being counselled by advocates during their detainment. From the targeted 180 respondents, the survey succeeded in contacting 115 respondents.

B.3. Interviews

Suspects being detained in the Cipinang Detaining Centre are also interviewed. This is intended to collect information that cannot otherwise be obtained from observation and survey. Such as whether there is differential treatment between those who obtain or not obtain legal aid, or is there something else that caused the defendant was reluctant to ask for their rights to the officer. Besides, LeIP also held interviews with advocates, police and judges to gain in-depth information of issues surrounding the implementation of the legal counsel policy from differing

⁸ We obtained permission on 28 October 2010 and asked to perform the survey on the same day, which is not feasible. We asked for a day for preparation and was allowed to do the survey on the following day, 29 October 2010.

perspectives.

Results of the observation and survey show the number and percentage of suspects or defendants who are not provided with legal counsel. As observation and survey are two different methods, in this report we are going to display the results separately. Results of the interviews will enrich recommendations of the program on how a policy of legal counsel is to be created and implemented.

Apart from activities that LeIP have been conducted during this research, LeIP also face bureaucratic challenges in conducting the survey. We have difficulties to obtain permits or long duration of the permit process. As reported in the monthly reports, we did not get permission to conduct surveys in the South Jakarta Police and Cipinang Correctional Institution. As a result of not getting the permit, with ABA approval, we conducted additional observations on the Court. West Jakarta Police, who gave permission surveys, also takes 1 month to get the survey permit.

LeIP expect the collaboration with law students as an observer / surveyor can help them understand the problems of the criminal justice system in Indonesia. However, we also face obstacles to adjust the time of observation and a survey with their academic activities. We tried as much as possible for not interfere their academic activities with Legal Survey.

C. Objectives

In general the program is intended to provide a picture of the weaknesses of the legal counsel policy in the Indonesian criminal justice system. This is intended to become a recommendation and a form of external pressure for lawmakers to reform the policy of legal assistance or counsel for citizens, especially those who have the right to legal counsel in criminal cases. Besides, the program is intended to identify conditions of defendants or suspects who have or lack access to legal counsel, and to provide data and arguments for policymakers in reforming the legal aid service through law and policies.

Success of this program will be based on the ability to produce the following outputs at the end of the program, as follows:

- (1) Standardised instrument for monitoring
- (2) Comprehensiveness of data for analysis:
 - a. Survey data in 2 police detaining centres
 - b. Observation data from 3 state courts

c. Survey data from detaining centres and correctional institutions

Each form of data will describe issues regarding legal counsel in each institution

(3) The final report will consist of monitoring instruments, data analysis and recommendations to improve legal counsel service.

E. Structure of Report

This report will consist of four different parts:

1. Chapter 1 – Introduction
2. Chapter 2 – Access to Legal Counsel
3. Chapter 3 – Implementation on Access to Legal Counsel on Criminal Cases
4. Chapter 4 – Conclusions and Recommendations

Chapter 2

Access to Legal Counsel

A. Regulations

The right to legal counsel, especially in the criminal justice system, is first regulated in Indonesia in Law No. 14 of 1970 on the Basic Provisions on Judicial Authority. Article 35 of the law states that legal counsel is a right for everyone involved in a case.⁹ Specifically for criminal cases, legal counsel is to be provided since the arrest and during detainment (Art. 36).¹⁰ However, the articles do not clearly set out the rights of disadvantaged citizens to obtain legal counsel, as they are merely general provisions about the right to have legal counsel in all stages of the inquiry process. The regulations also do not state the obligation of the state to provide legal counsel for disadvantaged citizens and the mechanisms.

Later, the right to legal counsel is guaranteed in Law No. 39 of 1999 on Human Rights, which state that everyone arrested, detained and prosecuted due to suspicion of a criminal act has the right of being considered not guilty until proven in a valid way in a court trial, and provided with all legal guarantees necessary for one's defence, according to the regulations of law.¹¹ Indonesia has ratified the International Covenant of Civil and Political Rights in Law No. 12 of 2005. This covenant states that everyone is guaranteed of one's rights of equality before the law. Everyone is entitled to legal protection without discrimination.¹² This legal protection is intended to protect anyone from inhumane and arbitrary punishment.

Law No. 8 of 1981 on the Criminal Procedural Code states for the interest of defence, suspects or defendants have the right to legal counsel. The legal counsel is to be provided by one or more advocates, during a certain period, and in all stages of the inquiry process.¹³ Article 56 of the code obliges law enforcers to provide advocates free of charge for defendants threatened with a death sentence or fifteen years or more; and for those who cannot afford advocates and are threatened with a sentence of five years or more and do not have their own legal counsel.¹⁴

⁹ Indonesia (4), *Law on Judicial Power*, Law No. 14 of 1970. Art. 35. "Everyone caught in a case has the right to obtain legal counsel."

¹⁰ *Ibid.*, Art. 36. "In a criminal case, a defendant, especially since the arrest and/or detainment, has the right to contact and ask for assistance from a legal counsel."

¹¹ Indonesia (5), *Law on Human Rights*, Law No. 39 of 1999, Art. 18 (1).

¹² Indonesia (1), *Op.Cit.*, Arts. 16 and 26.

¹³ Indonesia (2), *Op.Cit.*, Arts. 54-61.

¹⁴ *Ibid.*, Art. 56

Four years after the code is passed, the Department of Justice released a Ministerial Instruction No. M.24-UM.06.02 of 1985 on the Operational Guidelines for the Legal Counsel Program for Disadvantaged Citizens. This instruction results in existing legal counsel posts in courts, which are based on community initiatives, being funded by the state and managed by the local state court. However, the funds are not only allocated for legal counsel. The funds are in the form of a tactical fund that is allocated for various needs in the court process, such as prodeo process and meeting the cost of summons. Besides, the fund is combined with operational funds for legal services. The fund allocated for the legal counsel post is deliberately combined in the budget, as the actual use for prodeo processes is often lower than the budgeted amount. If the budget is fixed, it is often not realised due to trust problems.

A more specific regulation is found in Law No. 23 of 2002 on Protection of the Rights of the Child. Article 17 states that each child whose freedom is restricted has the right to obtain legal counsel or other assistance in an effective manner in every stage of legal measure taken, with the intention to defend oneself and obtain justice in front of an objective and impartial court in a closed trial procedure.

However, development of legal counsel has been rather rapid in the last two years. All of these laws mention the right of defendants to obtain legal counsel and the obligation of the courts to provide legal assistance.

Table 1
Laws Regulating The Right to Legal Assistance

No.	Laws	Provisions on Legal Aid
1.	Law No. 48 of 2009 on Judicial Authority.	<p>Art. 56</p> <p>(1) Everyone caught in a case has the right to obtain legal counsel,</p> <p>(2) The State carries the burden of case cost for seekers of justice who cannot afford it.</p> <hr/> <p>Art. 57</p> <p>(1) In each state court, a legal counsel post is created to serve seekers of justice who cannot afford paid legal counsel,</p> <p>(2) Legal counsel as mentioned in (1) is provided free of charge in all judicial levels until the decision on the case has reached permanent legal power.</p> <p>(3) Legal counsel and the legal counsel post as mentioned in (1) are implemented according to regulations set out in law.</p>
2.	Law No. 49 of 2009 on the Second Amendment of Law No. 2 of 1986 on General Courts.	<p>Art. 68B</p> <p>(1) Everyone caught in a case has the right to obtain legal counsel</p> <p>(2) The State carries the burden of case cost for seekers of</p>

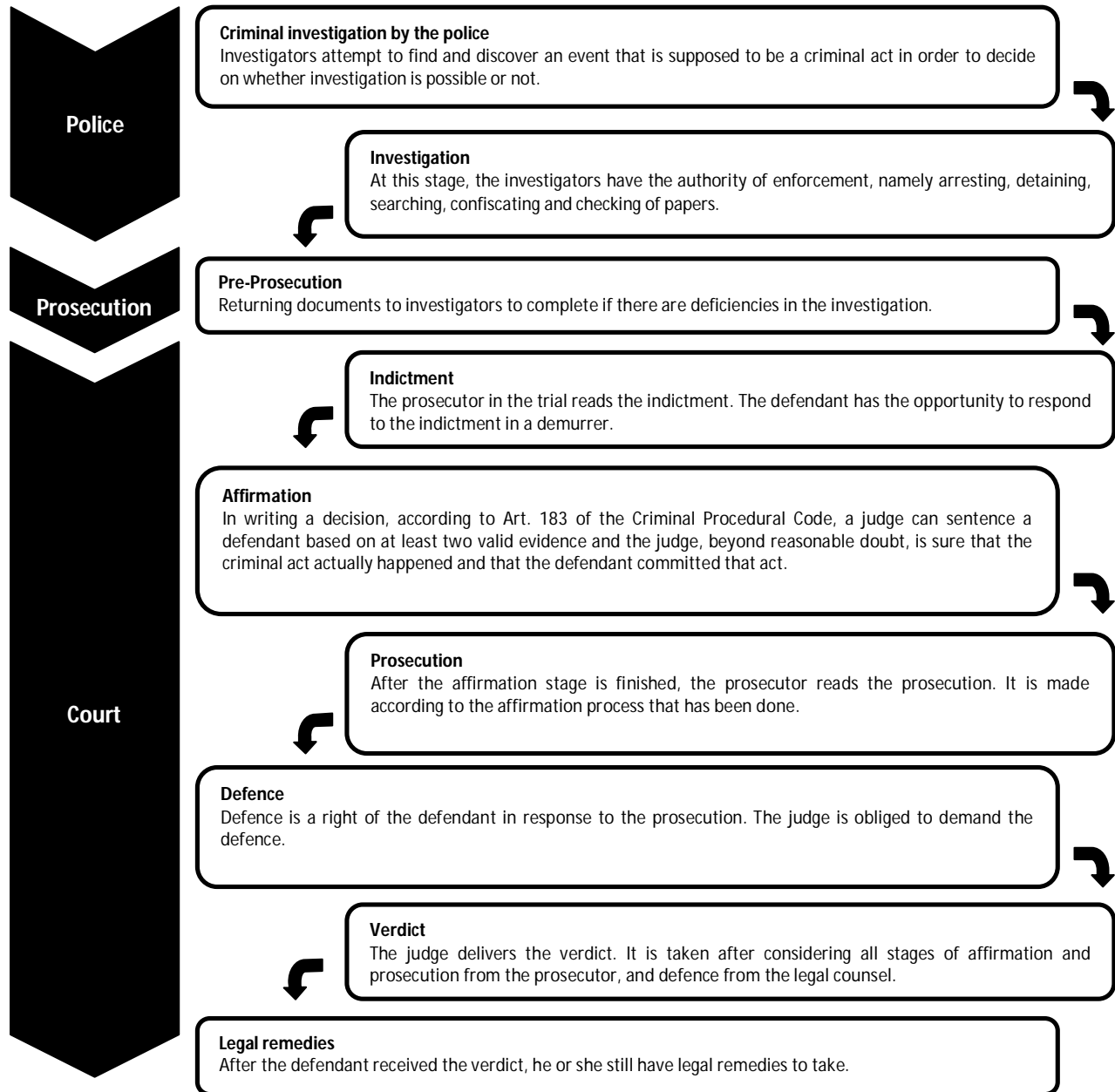
	<p>justice who cannot afford it,</p> <p>(3) The party which cannot afford legal counsel as mentioned in (1) has to attach a letter of explanation of economic incapability from the subdistrict where he or she domiciles.</p> <p>Art. 68C</p> <p>(1) In each state court, a legal counsel post is created to serve seekers of justice who cannot afford paid legal counsel,</p> <p>(2) Legal counsel as mentioned in (1) is provided free of charge in all judicial levels until the decision on the case has reached permanent legal power.</p> <p>(3) Legal counsel and the legal counsel post as mentioned in (1) are implemented according to regulations set out in law.</p>
<p>3. Law No. 50 of 2009 on the Second Amendment of Law No. 7 of 1989 on Religious Courts</p>	<p>Art. 60B</p> <p>(1) Everyone caught in a case has the right to obtain legal counsel,</p> <p>(2) The State carries the burden of case cost for seekers of justice who cannot afford it</p> <p>(3) The party which cannot afford legal counsel as mentioned in (1) has to attach a letter of explanation of economic incapability from the subdistrict where he or she domiciles.”.</p> <p>Art. 60C</p> <p>(1) In each religious court, a legal counsel post is created to serve seekers of justice who cannot afford paid legal counsel,</p> <p>(2) Legal counsel as mentioned in (1) is provided free of charge in all judicial levels until the decision on the case has reached permanent legal power.</p> <p>(3) Legal counsel and the legal counsel post as mentioned in (1) and (2) are implemented according to regulations set out in law.”</p>
<p>4. Law No. 51 of 2009 on the Second Amendment of Law No. 5 of 1986 on Administrative Courts</p>	<p>Art. 144C</p> <p>(1) Everyone caught in a case has the right to obtain legal counsel,</p> <p>(2) The State carries the burden of case cost for seekers of justice who cannot afford it,</p> <p>(3) The party which cannot afford legal counsel as mentioned in (1) has to attach a letter of explanation of economic incapability from the subdistrict where he or she domiciles.</p> <p>Art. 144D</p> <p>(1) In each administrative court, a legal counsel post is created to serve seekers of justice who cannot afford paid legal counsel,</p> <p>(2) Legal counsel as mentioned in (1) is provided free of charge in all judicial levels until the decision on the case has reached permanent legal power.</p> <p>(3) Legal counsel and the legal counsel post as mentioned in (1) and (2) are implemented according to regulations set out in</p>

law	
5. Supreme Court Bulletin No. 10 of 2010 on the Guidelines of Provision of Legal Counsel	Art. 6 (1) Each district court immediately establish a Legal Aid Post formation carried out in stages. (2) Chairman of the District Court to provide space and facilities needed to used as a Legal Aid Post, based on District Court abilities. (3) Service in Legal Aid Post provided by Advocate and the list of Advocate is established by the Chief District Court. (4) Arrangement and lists Advocate referred to in paragraph (3) arranged in institutional cooperation with the Institute for Legal Aid Providers through a process open and accountable and be reviewed and updated each year end budget. (5) Cooperation as referred to in paragraph (4) conducted by the District Court more than one institution to avoid conflict of interest provision of services to legal aid applicants who are equally entitled to the service by the Advocate.

This development results in the Supreme Court releasing Bulletin No. 10 of 2010 on the Guidelines of Provision of Legal Counsel. According to this bulletin, in each general, religious and administrative court there will be a legal assistance post. Judges should offer free of charge legal counsel to parties who cannot afford paid assistance. The guideline also mentions that the provider of the service in the post is to be appointed by the head of the court, in cooperation with professional advocates' organisations, legal aid organisations from universities and non-governmental organisation listed in the Ministry of Law and Human Rights.

To give clear explanation about the access of legal counsel in each stages of criminal justice system, we have to understand about the criminal procedure in Indonesia. According to Law number 8 Year 1981 on the Criminal Procedure, the criminal procedure is as follows:

Chart 1
The Criminal Procedure



B. Accessibility of Legal Counsel

The number of advocates practicing in Indonesia also influences access to seekers of justice in obtaining legal counsel and legal aid. The number of members of the professional organisation *Peradi* (Indonesian Association of Advocates) is no more than 11,333, by 30 March

2010.¹⁵ On the other hand, Indonesia's population is 237,556,363, according to Bureau of Statistics data in 2010.¹⁶ This means that the number of advocates available for seekers of justice is less than one percent of the total Indonesian population. This figure warrants comparison to the number of cases entering courts of first instance all over Indonesia in 2009, which is 3,531,613, of which 90.1% are cases in the general courts. The number of minor criminal and traffic violation amounts to 85%, and 5.1% are special criminal and civil cases.¹⁷ Despite the low interest of the citizens to utilise the court system, the number of practicing advocates in Indonesia is apparently inadequate to meet up the number of cases that do enter the courts, even if just for the criminal cases.

The issue of lack of access to legal counsel is worsened by the lack of financial capability of the defendant to the service of legal counsel. Even with the relatively small number of available practicing advocates, the lack of access is worsened with the much smaller number of advocates who provide their services free of charge. Based on data from the Indonesian Legal Aid Foundation, the number of such advocates does not exceed 200.¹⁸ Data from 14 legal aid offices show that each advocate provides between 2 to 5 counsels free of charge, and each advocate handles more than 3 cases at the same time. The annual report of the Jakarta Legal Aid Foundation mentions that there are 1,150 requests of free-of-charge services.¹⁹ 229 of these requests are for general criminal cases and 110 are for special ones.²⁰

Besides, the distribution of advocates in Indonesia is also unequal. *Peradi* data show that the greatest number of advocates is to be found in Java.

Table 2
Number of Advocates

No	Island	Number of Advocates
1	Sumatra	2351
2	Java	7954
3	Kalimantan	482
4	Sulawesi	113
5	Bali	281
6	Nusa Tenggara	78

¹⁵ Centre for Legal Aid Indonesian Association of Advocates, *Number of Lawyers Data* (Jakarta: 2010)

¹⁶ Bureau of Statistics. "Population of Indonesia by Province 1971, 1980, 1990, 1995, 2000 and 2010", <http://www.bps.go.id/tab_sub/view.php?tabel=1&daftar=1&id_subyek=12¬ab=1>

¹⁷ Supreme Court of the Republic of Indonesia, *2009 Supreme Court Annual Report*, (Jakarta: 2010), p. 34.

¹⁸ Jakarta Legal Aid Foundation, *2010 Annual Report*, (Jakarta: 2010)

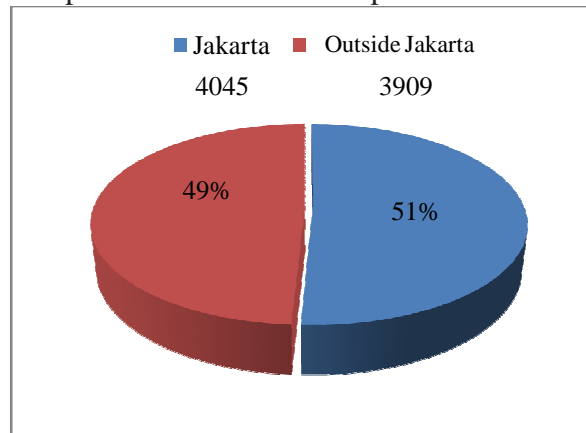
¹⁹ *Ibid.*, p. 8.

²⁰ *Ibid.*, p. 11.

7	Papua	74
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Yet the largest concentration of advocates in Java is to be found in Jakarta. *Peradi* records show that there are 4045 advocates in Jakarta, as shown in the following chart:

Chart 2
Advocates Population in Jakarta Compare to Other Cities in Java



Based on the data above, the survey and observation is intended to find out the condition of the implementation of the right to obtain legal counsel for defendants and suspects in Jakarta, which is regarded to have adequate access to seekers of justice to obtain legal counsel.

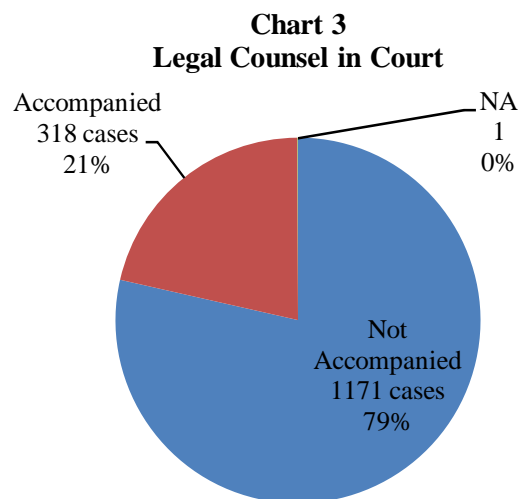
Chapter 3

Implementation on Access to Legal Counsel on Criminal Cases

A. Court Observation Results

A.1. Legal Counsel in Court

The number of cases that being analyses are 1490 cases.²¹ Out of this figure, it is found that 1,171 cases do not have legal counsel. Only 318 cases where the defendants have advocates, and there is one case in which advocate presence is unknown.



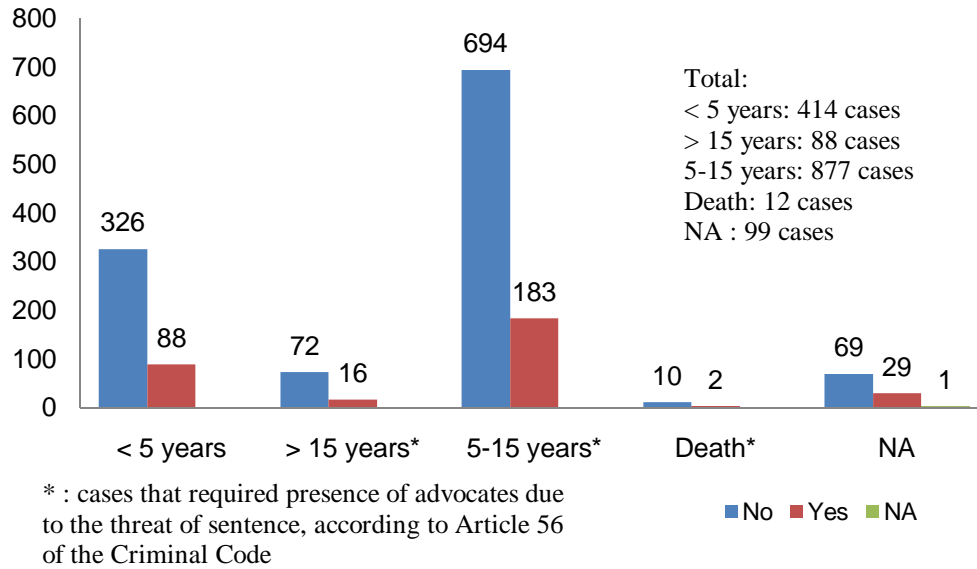
A.2. The presence of legal counsel categorised by threat of sentence

Out of the 1,171 cases in which there were no advocates, 776 of them were cases that required presence of advocates due to the threat of sentence, according to Article 56 of the Criminal Code. These cases are as follows:

1. Cases threatened with a sentence of 5-15 years, 694 cases,
2. Cases threatened with a sentence of more than 15 years, 72 cases, and
3. Cases threatened with the death sentence, 10 cases.

²¹ The observation was done on 1,686 trials. There are several cases that are monitored more than once due to different agendas in the trial, resulting that the total number of individual cases that can be further analysed being 1,490.

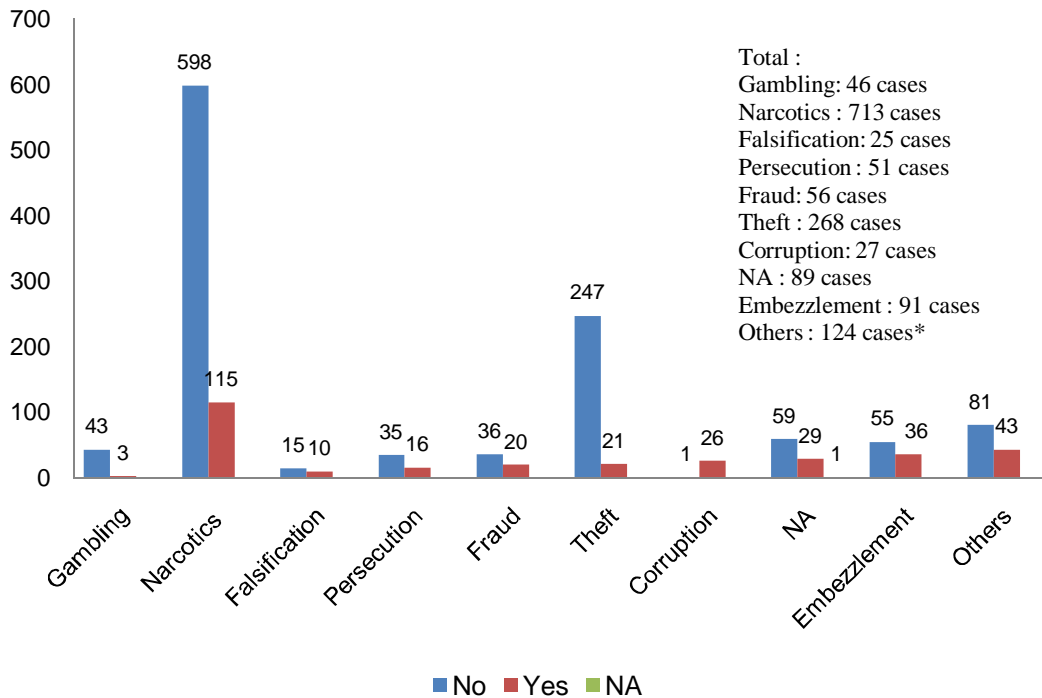
Chart 4
The Presence of Legal Counsel Categorised by Threat of Sentence



A.3. The presence of legal counsel categorised by Type of Case

Narcotics cases are the largest proportion of the cases in the observation. The number reaches 713 cases. The next largest proportion of the cases is theft, reaching 268 cases.

Chart 5
The presence of legal counsel categorised by Type of Case



*Others:

Without Legal Counsel: domestic violence, traffic accident, public victimisation, printing, trafficking in persons, fighting, consumer protection, evil conspiracy and adultery (1 case each), marital crime, vandalism, homicide (2 cases), copyright, electronic transaction, decency, money laundering (3), negligence, imposition of the will (4), health (5), fencing (6), money forgery, weapons (7), beatings (8), pornography (9).

With Legal Counsel: domestic violence, trafficking in persons, vandalism, decency, extortion, fencing, extradition, abuse, abduction, banking, taxation, electronic transaction (1), imposition of the will, annexation (3), defamation (4), money laundering, beating, traffic accident (5), homicide (6).

A.4. Findings of the Observation

During the observation LeIP has found trials that carry out in speedy time where in one session of trial are including several stages. There are 15 trials in which a session has an agenda encompassing indictment to the decision. In such cases, it is become difficult to obtain an adequate defense, especially when they do not have access to legal counsel. The following table shows trials in which there are more than one stages.

Table 3
Trials with More than One Stages

No	Trial Stages	Legal Counsel		Threatened Sentence				Total
		Yes	No	< 5	5-15	>15	N/A	
1	Indictment – Verification	3	115	38	71	7	2	118
2	Indictment – Prosecution	0	25	10	12	3	0	25
3	Indictment – Defence	0	13	7	6	0	0	13
4	Indictment – Decision	0	15	9	5	1	0	15
5	Verification – Prosecution	2	95	32	57	8	0	97
6	Verification – Defence	0	52	18	28	6	0	52
7	Verification – Decision	1	69	24	42	4	0	70

From the observation LeIP found 32 out of 391 cases in the indictment stages where the indictments are not read by prosecutor. Those 32 cases are cases where defendant not accompanied by legal counsel. It is not possible by the defendant to understand why they are accused by criminal charges without knowing the indictment. In contrast, 34 cases where defendant accompanied by legal counsel, the indictment are read by prosecutors. The condition shows in the following tables.

Table 4
Trial Process in the Indictment Stage

Presence of Legal Counsel	Indictment is read		Total
	No	Yes	
No	32	325	357
Yes	0	34	34

Total	32	359	391
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During the verification stage, out of 379 defendants not counselled by an advocate, 262 were not provided with opportunity to ask questions, and only 117 were. Even for defendants counselled by an advocate, 25 of 78 were not provided the opportunity. This condition shows in the following table:

Table 5
Trial Process in the Verification Stage

Presence of Legal Counsel	Judge provides opportunity to defendant to ask questions		Total	Judge provides opportunity to counter		Total
	No	Yes		No	Yes	
No	262	117	379	75	305	380
Yes	25	53	78	3	73	76
Total	287	170	457	78	378	456

The right of defence is an unalienable right of the defendant, which has to be provided in front of the trial. However, there are instances in which defendants are not given the opportunity to deliver their defence, in 22 cases. The number of defendants who delivered their defence was 276, of which 213 only delivered it orally; 197 of which were not accompanied by an advocate.

The data give rise to the conclusion that the absence of an advocate does give impact the defendants to deliver a proper defence. Even though, the judges always give opportunity for the defendants to deliver defence, however, defendants who are not counselled by an advocate often deliver their defence orally, which is lower in quality than written defence. The condition is shows in following table:

Table 6
Trial Process in the Defence Stage

Presence of Legal Counsel	Judge provides the right to defend		Total	Method to deliver defence			Total
	No	Yes		Oral	Oral and written	Written	
No	18	244	262	197	0	23	220
Yes	4	32	36	16	2	14	32
Total	22	276	298	213	2	37	252

The data show that presence of an advocate has a significant influence on the possibility of the judge offering the opportunity for appeal. Out of 62 defendants who are not provided with the opportunity for appeal, 61 were not accompanied by the legal counsel.

Table 7
Trial Process in the Decision Stage

Presence of Legal Counsel	Judge offer the opportunity for appeal		Total
	No	Yes	
No	61	220	281
Yes	1	31	32
Total	62	251	313

During the observation period there were 355 cases being tried in the decision stage. Based on the observation, 110 cases (31%) were decided with a sentence of 5 or more years without the presence of an advocate, and furthermore, 4 (1.13%) of these cases were decided with a sentence of 10 or more years. Only 7 cases (1.97%) of the cases decided with a sentence of 5 or more years were provided with legal counsel. Out of 120 cases with a sentence of 5 or more years, 114 (95%) were narcotics cases, while the rest consists of money laundering (2 cases), corruption, persecution, health and an unknown case (1 case each).

For the cases with a verdict of less than 5 years sentence, there were 83 cases (52.53%) of 158 decided with a sentence between 4-5 years, in which only 5 cases were provided with counsel from an advocate. The rest, 78 cases, did not have any counsel. Out of these 83 cases, 80 were narcotics cases, which have a minimum sentence of 4 years and a fine of IDR 800 million. The three other cases were one domestic violence case and two theft cases.

The observation data show that only 1 case resulted in acquittal, in which the act was proven to be committed, but did not satisfy the classification of a criminal act), and an advocate was present in the case. None of the defendants were sentenced with a fine. This is supposed to have been caused by the amount of the fine as mentioned in the Criminal Code no longer having correspondence with the developments in the value of the Indonesian rupiah. For new rules, such as those on corruption, narcotics, money laundering and health crimes, in general the threatened sanction is a combination of jailing and fines.

Table 8
Deliverable of Sentence

Verdict	Total		Advocate		No advocate	
	Number	Percentage	Number	Percentage	Number	Percentage
< 1	76	21,41%	4	1,13%	72	20%
1 < 5	158	44,51%	15	4,23%	143	40%
5 < 10	113	31,83%	7	1,97%	106	30%
>10	7	1,97%	3	0,85%	4	1,13%
Released/acquitted	1	0,28%	1	0,28%	0	0%
Total	355		30	8,45%	325	91,55%
4 < 5*	83		5	6,02%	78	93,98%

A.5 Other Findings in the Observation

Other than these findings above, the observation also results in the following interesting findings during the trials:

1. Incomplete council of judges

The high number of cases and the limited number of judges result in many trials not led by 3 judges. Often there are only two judges, even only one. In other instances, there is a judge substitution during the course of a trial. Based on the observation, judges do seem to be burdened with a high load of cases, up to 30 cases in a single day.

2. No Interpreter Provided Where the Defendant are Unable to Speak Bahasa

During the observation, there were instances of trials involving foreign nationals. If these nationals cannot speak Indonesian, no interpreter is provided.²² This occurred in a case involving an Indian citizen as a defendant in a narcotic case.

3. Unprofessional conduct of Law Apparatus

Several judges have been found fallen asleep during a trial session, chatting with each other, or tinkering with their gadgets. Besides, documents that should be informed to the defendants are often not read, or only partially read, lacking clarity and detail. As an example, prosecutors often only read the threatened sentence part of the prosecution. Judges also often read only the injunction part of the decision, without the considerations. Defendants are often confused by this issue. The pressure to the defendants becomes higher as in some cases, judges and prosecutors use improper words to address the

²² Indonesia (2), *Op.Cit.*, Art. 53(1), "In a police investigation and court investigation, the suspect or defendant has the right to obtain assistance from a language expert."

defendants. In contrary, in a case in which the defendant was accompanied by an advocate, the judge seemed to be very friendly, even joking with the defendant.

The verification process often does not really prove whether a defendant is guilty or not. Often the prosecutor only presents the police who arrested the defendant, reads the minutes of examination written by the police, and does not present any defending witnesses. Judges also often do not provide defendants with the opportunity to defend or counter evidence presented by the prosecutor. In some cases, judges often force defendants to acknowledge their act, by raising their voice, pointing fingers, and scolding them. In a case tried in 12 October 2010 in the West Jakarta State Court, the chief judge of the council suggested to the defendant not to write a demurrer, as 'in the end it will be rejected'. The judges often also force what is written in the minutes of the examination to the defendant.

This becomes worse during the reading of the decision or verdict. While decisions should have been reached in a deliberation of the judges, deliberations are often held following the reading of the prosecution. The 'deliberation' was often done very shortly, without careful consideration, resulting in an instant decision.

4. Short trial length

Based on the findings of the observer, the judges often hold trials in a 'relay'. This means that the examinations are done in succession, and done in a short time, except when there is a legal counsel. Narcotics cases, for example, are finished in a short time, including examination of witnesses consisting only of the police arresting the defendant. There is a narcotics case that took only 10 minutes from the indictment to the prosecution, and a case in West Jakarta in which only 3 minutes are required from the reading of the indictment to the decision.

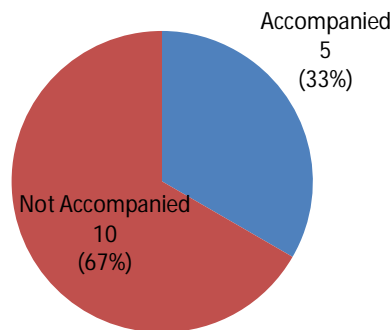
5. Postponement of trials

Prosecutors often do not perform optimally, documents (indictments, prosecution) are often unfinished, witnesses are not invited, etc. This results in postponement of trials. This results in trials lasting longer than necessary, often violating rules of maximum detention lengths. Not a few defendants were detained for a period longer than the allowed maximum detention length.

B. Survey on the Detaining Process in Police Station

From 15 suspects surveyed, 5 of them were accompanied by an advocate. This makes up 33.3% of the total number.

Chart 6
The Presence of Legal Counsel for the defendant on the Detaining Process in Police Station



The Legal Aid Foundation counselled 3 of the 5 suspects. The five suspects consist of 2 theft suspects, 2 narcotics suspects and 1 suspect with unknown crime.

Three of the counselled suspects are threatened with a sentence of 5 to 15 years, and six others were threatened with a similar sentence, but were not counselled by an advocate. One case with counsel is a theft case with a threatened sentence of less than 5 years, and the other is unknown.

Chart 7
The Presence of Legal Counsel for the defendant on the Detaining Process in Police Station categorised by Type of Cases

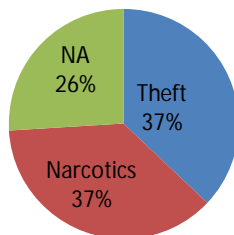
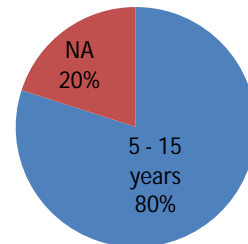


Chart 8
The Presence of Legal Counsel for the defendant on the Detaining Process in Police Station categorised by Threat of Sentence



C. Survey on the Detention Houses

The survey in the detention houses is done on 100 respondents. 95 of the respondents stated that they did not have legal counsel during the police investigation stage. During the court trials, 92 of them stated that they did not have legal counsel.

Chart 9
The Presence of Legal Counsel for the defendant on the Detaining Process in House of Detention on Investigation Process

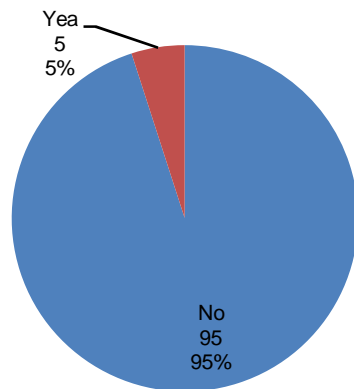
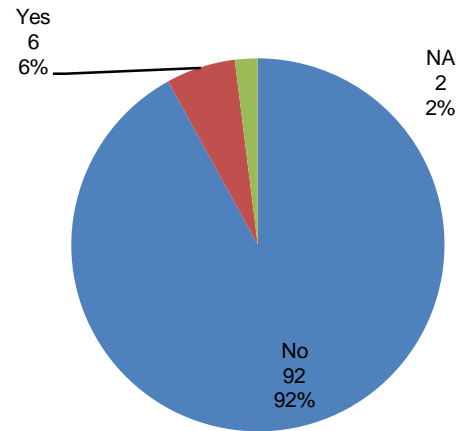


Chart 10
The Presence of Legal Counsel for the defendant on the Detaining Process in House of Detention on Trial Process



Almost all of the cases where the presence of legal counsel are compulsory, according to Article 56 of the Criminal Procedural Code, the suspects were not accompanied by legal counsel. During the police investigation stage, 73 of the 95 cases that did not have any legal counsel were cases threatened with a sentence between 5 and 15 years. In the court, 73 of the 92 cases were similarly threatened.

Chart 11
The Presence of Legal Counsel for the defendant on the Detaining Process in House of Detention on Investigation Process categorised by Threat of Sentence

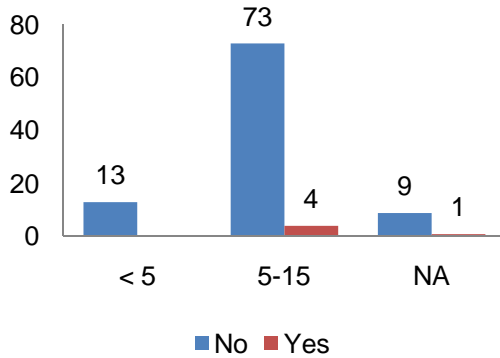
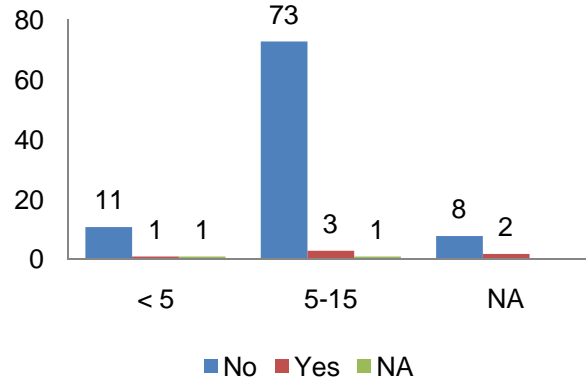


Chart 12
The Presence of Legal Counsel for the defendant on the Detaining Process in House of Detention on Trial Process categorised by Threat of Sentence



Most respondents of the survey were still waiting for the court trial processes, and were still in detention. However, the surveyors found about 30% of 115 respondents have their trials ongoing. Only 5 of the respondents having ongoing trials were accompanied by a legal counsel in the trials, 4 of them having the counsel free of charge and 1 paying the cost himself. The following table shows the results of the survey in relation to the rights of the suspect/defendant, such as delivering a demurrer, questioning witnesses and delivering defences. Narcotics and theft are the main criminal acts that land the respondents to the detention house. 44 respondents were involved in narcotics cases and 27 in theft cases.

Chart 13
The Presence of Legal Counsel for the defendant on the Detaining Process in House of Detention on Investigation Process categorised by Type of Case

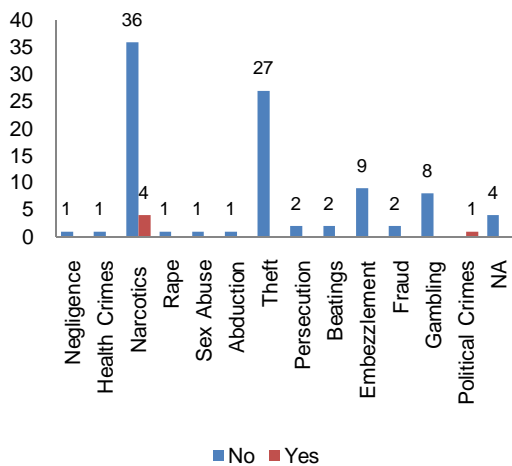


Chart 14
The Presence of Legal Counsel for the defendant on the Detaining Process in House of Detention on Trial Process categorised by Type of Case

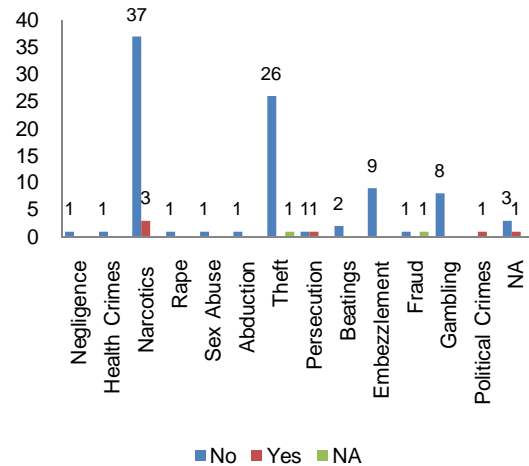


Table 9
Rights of Suspects

No	Rights	Yes	No	N/A
1	Given opportunity to deliver demurrer	22	8	85
2	Given opportunity to question witnesses	19	17	79
3	Given opportunity to deliver defence (oral/written)	14	21	80
4	Given opportunity to demand legal remedies	17	17	81
5	Demanded legal remedies	0	35	80
6	Received transcript of decision	19	14	82

These findings show the condition of the detainees facing the penal process without the presence of legal counsels who will explain to them their rights that are set out in legislation. The basic right of the suspects/defendants is to defend their interests. The survey found that out of 14 respondents provided with the opportunity for defence, only 5 gave written defences. The rest gave oral defences. Other basic rights such as the right to appeal, right to obtain transcript of decision and even the right to be free from pressures seem to be absent for many respondents.

D. Other Findings

In depth information also found the following interesting facts:

The researchers and interviewers found a general condition causing the absence of legal counsel or legal aid among the research subjects, namely:

- a) the notion that legal aid costs a lot of money to pay for the advocate;
- b) legal aid is not offered by the law enforcement officer on duty;
- c) instructed to not use legal aid by the law enforcement officer, suggesting that the sentence would be milder;
- d) fear of the law enforcement officer, that the suspect/defendant would be tortured if not submitting to the demands;
- e) lack of funds to pay for the advocate;
- f) lack of knowledge of the Legal Aid Post that can provide legal aid free of charge, provided by the state; and

- g) Lack of knowledge of rights of a suspect/defendant during the investigation and trials process.

Beside the findings written above, the surveyors also found that the informant are admitted that they being tortured by investigators to admit a criminal offences. All of three informants are not accompanied by legal counsel. The form of torture are including beaten with hand and sticks, the suspect feet was put under a heavy table leg, thumbs were tied with a steel wire, their toes put under a heavy table leg, legs struck with heavy implements, verbal assault, been shouted by the investigator etc.

Chapter 4

Conclusion and Recommendation

A. Conclusion

The major weakness of the Indonesian criminal procedural law that contributed why there are so many criminal cases could be trialled by the court with the absence of the legal counsel or legal aid is caused by no clear regulation that mentioned the consequences of such condition. The condition is worsened by the paradigm of the law enforcements officers. Many police regards that legal counsel is only an obligation to be provided to suspects threatened with a sentence of fifteen years or criminal act that threatened by life sentences or death penalty. As a result, for instance suspects of theft, fraud, rape, etc which are threatened with a sentence of five years or more, are not guaranteed of obtaining legal counsel.²³

The courts also seems that they do not have clear position about this issue, and will not take the absence of legal counsel as a serious problems of rights of the defendants to get a fair trial. Even if they knew that without a legal counsel it is very hard for the defendants to get a appropriate defences, such as bring witnesses, evidences etc. Our observation shows that about 75% of court sessions during the observation period are marked by the absence of legal counsels. In these sessions, offer of legal aid during the indictment stage to the defendant was only found in 37 instances. The logical consequence of the condition is the lack of understanding of the rights of the defendants in the court. Only 200 defendants who are not given legal counsel delivered a defence, and only 19 of them did it in written form.

The observation found that about 90% of the defendants were detained. About 90% of that figure lacked legal counsel, while about 70% of them were threatened with a sentence of 5 years or more, including the capital punishment. Findings show an indication of a violation of the rights of the defendants through the behaviour of law enforcers disregarding procedural laws.

In order to confirm these findings, the research team performed in-depth interviews with the leaderships of the court. The Central Jakarta State Court, based on the Supreme Court Circular No. 10 of 2010 on the Guidelines of the Provision of Legal Counsel, created an internal procedure for provision of legal counsel. The Head of the Court mentions that the judges have

²³ Interview with the head of the detective and criminal section of West Jakarta Police.

two tasks. The first is to explain the rights of the defendants to obtain legal counsel, and to offer legal counsel free of charge for defendants threatened with a sentence of less than five years. The second is to appoint directly a legal counsel to accompany the defendant if the judge finds a defendant threatened with a sentence of five years or more, but is not accompanied by an advocate.²⁴

Results of the observation show that the majority of defendants who have been offered legal counsel by the panel refused the service. The Central Jakarta State Court admitted that the number of requests for legal counsel in 2010 was nil. The Chief of the Court regards that this is caused by the complexity of the procedure to obtain the pro bono legal counsel in the court.²⁵

On the other hand, Fikri Assegaf, the Head of the Legal Aid Section of the Indonesian Association of Advocates, regards that the reluctance of the defendants to use their rights is caused by the law enforcers' attitude since the police investigation stage. They often push suspects to relinquish their right to legal counsel as it is claimed to make the case more complex and prolong the problem.

The condition above makes us to question why the implementation of the right to obtain counsel is often disregarded by law enforcers. The discretion of law enforcers in the criminal penal code has a major role to play in preventing the execution of the right to obtain legal counsel, and the obligation set out in Article 56 of the CPC also does not carry any consequence in the case of failure to comply.²⁶

The findings of the observation show that the presence of the legal counsel appointed from the legal aid post, as directed by the Supreme Court circular, can be seen in previous sessions. However, observers found that sometimes the advocates did not come again in the later sessions. This happened inspite the number of advocates in the regions observed being more than

²⁴ The head of the Central Jakarta State Court cannot provide data to support this statement. According to him, all documents have as attachment data on legal counsel appointed by the panel of judges. However, he cannot show the data to the interviewer.

²⁵ Supreme Court of Indonesia, *Circular on Guidelines of the Provision of Legal Aid*, Circular No. 10 of 2010, Art. 11. "The applicant should prove it with a certificate of poverty from the head of village, certificate of social support and declaration of poverty."

²⁶ CPC regulates the consequence of the validity or otherwise of arrest, detainment, termination of investigation, termination of prosecution and request of compensation or rehabilitation by the suspect and the family through the pretrial institution.

adequate. The total number of advocates in South, West and Central Jakarta regions is 3,837, more than elsewhere in Indonesia.²⁷

Another factor that contributed to the lack of legal councils for the criminal cases are in the side of the Bar Association. In principle, an advocate is obliged to provide equal treatment to cases handled *pro bono* and cases handled for a payment. Sanctions are given to advocates who neglect this obligation, based on the advocates' code of ethics and Peradi's internal regulations. Peradi suggests that its members give at least 50 hours per year for free of charge legal assistance. But in reality not all of the advocates already serve its duty, and seems that there are no clear steps to solve these problems.

B. Recommendations

Pushing for the right to legal counsel as a fundamental right is important. The most important step to improve the implementation of the right must begin in the criminal court. Defendants in criminal cases should be given priority in regulations obliging institutions or professionals to provide legal counsel at no cost.

Indonesia already possesses strong regulations guiding the provision of legal counsel, from the constitutional level to the internal regulation of the advocates' association.²⁸ However, the right of legal counsel in laws and regulations still difficult to be implemented. This is critical problem because most of the suspects are vulnerable to violations of their rights, as they can be forcibly sanctioned without proper defence. Moreover, they have difficulties in accessing legal counsel because most of them are economically weak.

The regulation should minimally regulate the consequences of the absence of legal counsel in a criminal case, for example, the court should reject the case without defendant being accompanied by legal counsel. It should also regulate the consequence for state apparatus or law enforcement, when it fails to provide legal counsel in all criminal cases. Another recommendation that should be offered is to equalise the number of advocates in all parts of Indonesia to broader the access to legal counsel.

²⁷ Data from the Peradi Legal Aid Centre, 30 March 2010: 1,103 in Central Jakarta, 1,860 in South Jakarta and 349 in West Jakarta.

²⁸ 1945 Constitution, Law No. 18 of 2003 on Advocates, GR No. 83 of 2008 on the Requirement and Procedure of Free of Charge Legal Counselling, Supreme Court Circular No. 10 of 2010 on the Procedure of Provision of Legal Counselling and Peradi Regulation No. 1 of 2010 on the Procedure of Free of Charge Legal Counselling.

The active role of the Indonesian Association of Advocates is also instrumental in guaranteeing the provision of legal aid. Indonesian Advocate Association (*Peradi*) has to encourage their members to provide legal aid in accordance to the law.

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